NO. 541

IN THE

SUPREME COURT OF THE UNITED STATES

LOUIS LeLAURIN
Petitioner

v.

FROST NATIONAL BANK TRUSTEE et al
Respondent

PETITION FOR WRIT OF CERTIORARI

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Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now, Louis LeLaurin, Petitioner, and petitions this Honorable Court to issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review that said Court's final decision in Case Number 24,779 on the docket of said Court, and styled Louis LeLaurin v. Frost National Bank of San Antonio, Texas, as Trustee under the will of Jack Ammann, Deceased, et al; also styled Frost National Bank of San Antonio, Texas, as Trustee under the will of Jack Ammann, Deceased, et al; v.

Louis LeLaurin,[1] a copy of which is attached hereto as Appendix "A," and in support of said petition would show unto this Honorable Court the following:

JURISDICTION

The jurisdiction of this Honorable Court is sought to be invoked on the following grounds:

The decision of the Court of Appeals herein sought to be reviewed is in conflict with the decision of another Court of Appeals on the same matter;

The decision of the Court of Appeals herein sought to be reviewed involves an extremely important question of Federal law relating to allowances of attorney's fees in bankruptcy proceedings which this Honorable Court has never specifically ruled upon, though there is substantial law directly supporting Petitioner's position, and this Court should therefore settle once and for all the question herein presented.

The decision of the lower Court herein sought to be reviewed was handed down on March 21, 1968, and Petitioner's motion for rehearing was denied without written opinion by said Court on June 20, 1968.

The statutory provision herein relied upon to confer upon this Honorable Court jurisdiction to review the judgment below is Title 28, United States Code, Section 1254, in its pertinent parts as follows:

"Cases in the Court of Appeals may be

1 F. ____ 2d ____,

reviewed by the Supreme Court by the following methods:

"By writ of certiorari granted upon the petition of any party to any civil * * * case, before or after rendition of judgment or decree; ****"

QUESTION PRESENTED

Whether the State or the Federal Courts shall determine allowances against bankrupt estates for attorney's fees upon claims allowed by a referee in bankruptcy?

CONSTITUTIONAL PROVISION AND STATUES

ARTICLE 1 § 8 as follows:

"The Congress shall have Power To * * * establish * * * uniform Laws on the subject of Bankruptcies throughout the United States; ****"

TITLE 11 U.S.C. § 1 (10) as follows:

" 'Courts of bankruptcy' shall include the United States district courts * * * to which this title is or may hereafter be applicable; ****"

TITLE 11 U.S.C. § 11 as follows:

"(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title. * * *

as they are now or may be hereafter held, to–

> "(2) Allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.
>
> "(7) Cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, ****"
>
> "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title, Provided, however, That an injunction to restrain a court may be issued by the judge only; ****"

STATEMENT

Petitioner was retained by the Frost National Bank of San Antonio, Texas to pursue a claim held by the Bank as testamentary trustee against Geotechnics and Resources, Inc., a bankrupt. The Bank's claim was evidenced by a promissory note[2] on which $333,056.38 was due and unpaid, and a deed of trust on realty occupied by the bankrupt to secure the note.

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2 The note required the Maker to pay 10% of principal and interest as attorney's fees if the note was collected, inter alia, in bankruptcy proceedings.

At the time Petitioner was retained to represent the Bank, no agreement between them was made concerning Petitioner's fee.[3]

Subsequent to his employment, Petitioner appeared in the bankruptcy proceedings on behalf of the Bank and was successful in obtaining an Order from the Referee allowing a secured claim in the amount of $358,056.38, consisting of $333,056.38 principal and interest due under the note, and $25,000.00 attorney's fees.[4] The order further determined that the mortgaged premises were burdensome to the bankrupt estate and were abandoned with leave to the Bank to foreclose its mortgage. Further, the Order determined that the reasonable value of the secured premises was $225,000.00. Hence the entire secured claim of $358,056.38 was reduced by the value of the security, i.e. $225,000.00. The Referee in his Order then allowed the balance of the claim of $133,056.38 as an unsecured claim. Thereafter, the Trustee paid to the Petitioner the sum of $15,590.69 representing a dividend on the unsecured balance of the claim of $133,056.38. Petitioner retains this sum in his possession under a Claim of Lien for his fee.[5]

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3 Petitioner and the Bank have agreed that in the absence of a fixed agreement, the law requires the Bank to pay Petitioner a reasonable fee for services rendered.

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4 A Proof of Secured Claim, verified by the Bank's Trust Officer was filed wherein it was asserted that the bankrupt should be required to pay $33,305.64 attorney's fees; later, Petitioner filed a Petition in Intervention setting forth the totality of the Bank's claim resulting in the Referee's Order with which we are concerned.

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5 At or about the time Petitioner was retained, the Bank paid him by way of a retainer the sum of $2,500.00 which must be taken into account in considering the figures here stated.

Petitioner and the Bank were unable to agree upon the sum which should be paid to Petitioner for his services. Petitioner claims that the Referee's discretionary allowance of the sum of $25,000.00 as an attorney's fee is determinative of the issue of the reasonable value of the services which Petitioner performed for the Bank in the bankruptcy proceedings. The Bank denied that the Referee's Order amounted to anything more than an allowance to the Bank to make the Bank whole since the note had to be collected through bankruptcy proceedings, and that the Referee's Order fixing $25,000.00 as attorney fees was not determinative of the reasonable value of the services performed by Petitioner for the Bank in the bankruptcy proceedings.[6]

Subsequently, Petitioner filed in the District Court an ancillary Bill to enforce the final orders and decrees of that Court, specifically the Referee's Order allowing the Bank's claim which included the allowance of attorney's fees. Petitioner asserted that the Bank was unlawfully withholding $16,798.38 from him as his pro rata share of the Bank's total recovery of $240,590.69.[7] Petitioner's Bill further sought an injunction against the Bank to prohibit the Bank from pursuing a State Court declaratory judgment proceeding filed by the Bank having as its stated purpose a

6 The Referee's Order in this respect became final; the estate of the bankrupt was completely distributed and was closed.

7 $240,590.69 is the sum of the $225,000.00 evaluation placed upon the building by the Referee, plus the $15,590.69 dividend. Petitioner's pro rata share is computed as follows: $25,000.00 is 6.98% of $358.056.38 - so - 6.98% of $358.056.38 = $16,798.38.

determination of the reasonable amount of attorney's fees due Petitioner for his services in representing the Bank in the bankruptcy proceedings.[8] In addition Petitioner's bill sought foreclosure of his common-law attorneys lien on the $15,590.69 dividend in his possession; an order requiring the Bank to pay the balance of the total allowance up to $25,000.00 and also sought allowance of attorney's fees and court costs for the Petitioner's attorney who brings these proceedings.[9]

The Bank moved to dismiss Petitioner's bill for lack of jurisdiction on the grounds that it was an attempt to remove the State declaratory judgment proceeding to Federal District Court without the requisite diversity and on the ground that the Referee's allowance for attorney's fees was an allowance to the Bank for its own use and benefit and was in no way determinative of the amount of Petitioner's fees nor an allowance directly nor indirectly to Petitioner

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8 The State Court proceedings are being held in abeyance by agreement subject to this Honorable Court's action herein. It should be noted that these proceedings in the District Court were not instituted until after the State Court had summarily dismissed all of Petitioner's contentions which he has presented in these proceedings.

9 Vernon's Annotated Texas Civil Statuts Art. 2226 allows for the recovery of attorney's fees and court costs incident to the recovery of a judgment for personal services rendered. Texas Courts hold and the Fifth Circuit Court has recognized that legal services fall within the purview of said statute. See text of Art. 2226 in Appendix "B" and see Burnett v. Graves, 230 F2 49 (C. A. 5), Urschel v. Crow, Tex. Civ. App. 314 SW2 423 writ refused n.r.e., and Youngblood v. Wilson & Curetan, Tex. Civ. App. 321 SW 2 887 writ refused n.r.e.

for representing the Bank in the bankruptcy proceedings.[10]

The District Court assumed jurisdiction for the limited purpose of giving effect to the Referee's Order, and while holding that the Bank must pay the entire allowance for attorney's fees to Petitioner or return it to the bankrupt estate, refused to enter an order directing the Bank to presently do either upon the apparent conclusion that the Referee's allowance of attorney's fees was not a Judgment as between the Petitioner and the Bank as respects the reasonable value of the services performed by Petitioner in the bankruptcy proceedings. The District Court also refused to stay the State Court declaratory judgment proceedings and denied Petitioner his claim for attorney's fees and court costs under the State statue providing for same.

In its opinion, the Circuit Court affirmed the District Court's order in all things. The opinion evidences no intention to add to or detract from said Order, though some of the comments in the opinion necessarily confuse integral portions of the Order relating to how many of the $240,590.69 dollars are "attorney's fee" dollars.

ARGUMENT

Your Petitioner respectfully submits that the answer to the question hereinabove presented must be

10 The other parties against whom the proceedings in the District Court were brought are beneficiaries of the testamentary trusts. Each adopted the position of the Bank and none have been active in the proceedings since that time.

that Federal Courts alone may lawfully determine allowances against bankrupt estates. Clearly Art. 1 § 8 of the Constitution, supra, and the Bankruptcy Act, specifically Title 11 U.S.C. § 11 (2) and (7), supra, forecloses any serious question that a State Court may directly or collaterally determine or fix any part of a claim filed with a Bankruptcy Court.

There can be no question that it was the intention of Congress as reflected by the Bankruptcy Act and as interpreted by this Court on numerous occasions that the Federal District Courts as Bankruptcy Courts have exclusive and paramount jurisdiction to collect, handle, manage and distribute estates of bankrupts and to decide with judicial finality any and all "controversies in relation thereto."[11] Petitioner submits that it is all the more ridiculous to consider that a State Court may determine allowances "for" Federal Bankruptcy proceedings after the particular allowance in question has been judicially determined by the Federal Bankruptcy Court and where the Order making such determination has become final by law and the bankruptcy proceedings closed.

It appears to be the unwavering position of the Bank that the Referee in Bankruptcy was doing a useless thing when in the exercise of his discretion he determined that $25,000.00 should be the amount charged against the bankrupt's estate on account of the covenant to pay 10% attorney's fees contained in the note held by the Bank, notwithstanding the

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11 U.S. v. Knight 336 U.S. 505

fact that the Bank had voluntarily submitted the collection of the note to the Bankruptcy Court and through its Trust Officer has sworn that it was entitled under said note to attorney's fees of $33,305.64.

While no party is contesting the *validity* of the Bank's claim for attorney's fees as a proper charge against the bankrupt estate, it is helpful to inspect the claim for attorney's fees as same relates to the Referee's authority to allow the fee for the very important reason that the proper "construction" of that claim determines the enforceability or not of the claim in bankruptcy proceedings and how these proceedings should be viewed by this Honorable Court.

A survey of the Bankruptcy Act reflects the absence of any affirmative provision for the allowance of an attorney's fee out of a bankrupt's estate to a non-petitioning creditor where the services of the attorney have been limited to proving the creditor's claim. Title 11, § 104 (a) may be authority for an allowance of attorney's fees to a non-petitioning creditor if his efforts have preserved the estate, uncovered hidden assets or resulted in rejection of an arrangement or wage-earner plan. Section 104 (a) specifically provides for the allowance of attorney's fees to petitioning creditors in involuntary cases and to the bankrupt in involuntary cases and voluntary cases.

If a non-petitioning creditor is to secure an allowance against the bankrupt estate for attorney's

fees some other provision of the Act must be invoked. The proper provision is Title 11, § 103, which sets out the "debts which may be proved." As applied to these proceedings, the following portion of Section 103 is pertinent:

> "Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not * * * (4) a contract express or implied * * * (8) contingent debts and contingent contractual liabilities."

In other words, a creditor may make recovery against the bankrupt estate if he is able to bring his claim within any of the provisions of Section 103.

It is apparent that the Bank's claim was filed and considered by the court under the above-quoted provisions of Section 103. This being true, it is necessary to consider the manner in which the Referee treated the claim in allowing it. Stated simply, it makes sense to look to the claim presented and determine precisely how it was treated by the Referee in the order.

At the outset, it is clear that an unlawful debt would not be allowed as a charge against an estate. In other words, Section 103 presupposes the "regularity" of the bankrupt's debt to the creditor. Hence,

the allowance of a claim presupposes not only that the Referee has concluded that the debt is of a class mentioned in Section 103, but also that it is "regular" and therefore enforceable in bankruptcy. Though the debt be of a class mentioned in Section 103, if it was born in fraud, is payment for illegal consideration, arises out of an unlawful contract or one against State or Federal public policy, or if there exists other impediment, it is rendered unenforceable. This process, therefore, necessarily identifies the substance of the debt. The Referee identifies the debt before he allows it. *In the instant proceeding the Referee identified a number of debts owing from the bankrupt to the Bank, but they were not all allowed. Notwithstanding some fell into a class mentioned in Section 103, they were not "regular," were not therefore enforceable, and were expressly disallowed.*

Looking to the order, it appears that the Referee identified five debts owing from the bankrupt to the Bank:

1. Principal and interest;
2. Ten per cent penalty interest on unpaid principal and interest;
3. Simple interest from and after the date of filing of the petition;
4. Ten per cent of principal and interest owing as attorney's fees;
5. Rental payments collected since the filing of the petition.

Of the debts identified, Nos. 2 and 3 were against Federal policy, were not therefore "regular"

and were disallowed in toto; Nos. 1 and 5 were recognized as "regular" and were allowed in toto; No. 4 was identified as "regular" but discretionary and as such was allowed in part.

In construing the claim and determining the enforceability of the debt consisting of principal and interest, rents, and attorney's fees, the Referee's order reflects the following findings: (1) a note was executed; (2) the note was for value; (3) the note was delivered; (4) the note was a valid and existing obligation of the bankrupt; (5) the note was secured by a valid existing deed of trust lien; (6) the note provided for 10% penalty on matured and unpaid principal and interest; (7) the note provided for attorney's fees in the amount of 10% of principal and interest owing; (8) the Bank was the trustee of two private trusts; (9) The Bank was owner and holder of the note and deed of trust; (10) The Bank placed the note and deed of trust in Petitioner's hands for collection; (11) that the note an deed of trust were in default; (12) that the value of the mortgaged premises was less than the Bank's claim; (13) that the Bank's claim should be allowed as a secured claim; (14) that the Bank should be permitted to foreclose its deed of trust; (15) that the mortgaged premises were burdensome to the bankrupt estate; (16) that the bankrupt estate had no equity in the mortgaged premises; (17) that the amount of principal and interest owing upon filing of the petition was $333,056.38; (18) that penalty interest is not allowable; (19) that simple interest on principal after date of filing of the petition is not allowable; (20) that rents from the premises were secured by the deed of trust and should

be paid to the Bank by the Trustee with an accounting; (21) that attorney's fees were allowable in the court's discretion, and were allowed in the amount of $25,000.00.

It may be fairly said that the Referee's order, in full compliance with General Order No. 23, made all findings necessary and proper to the determination that a secured claim in the amount of $358,056.38, consisting of $333,056.38 principal and interest and $25,000.00 attorney's fees, was enforceable against the bankrupt's estate. The Referee's discretionary allowance of $25,000.00 will always remain an allowance for attorney's fees. Its character will not change.

It would be difficult indeed to envision a more thorough and complete adjudication of a claim presented to the Bar of Justice than that demonstrated by the Referee's order in these proceedings. Is it not apparent from this analysis that a clear, unequivocal and final order has been entered in due course of law by a court having jurisdiction of the subject matter and the parties?

To what more is the Bank entitled? Is the Bank entitled to procure an allowance for attorney's fees in the Bankruptcy Court and use the allowance for another purpose? Is the Bank entitled to secure an allowance for attorney's fees from a Bankruptcy Court and keep part of the allowance for itself, though it is not an attorney and performed no such services? Is the Bank entitled to verify an attorney's fee claim for

$33,305.64 in the Bankruptcy Court, secure and accept the benefits of an allowance for $25,000,00. and then proceed to State Court seeking a determination of the reasonable value of the same allowance? Is the Bank entitled to withhold from Petitioner, its attorney, the allowance for attorney's fees the Referee has allowed and paid to the Bank? Petitioner respectfully says that this Court's answer to these questions must be a resounding "No." The Bank has had its day in court.

It might be well to emphasize the fact that the claim amounted to a first mortgage lien and as such was allowed by the Referee as a secured claim to the extent of the security, with the balance being allowed as an unsecured claim. The allowance for attorney's fees was considered by the Referee as part of the claim itself and was allowed as a part of it. The effect here, of course, is that the pro rata portion of the $240,590.69 paid by way of the allowance is treated as a lien against the security. Simply stated, the Referee treated the attorney's fee allowance as a lien against the security for the note. Hence, it is evident that the Referee intended the Petitioner to participate fully with the Bank in all monies or property recovered by the Bank. It is impossible, Petitioner believes, to view the Referee's order differently. The Referee has simply determined: that the bankrupt was obligated to pay attorney's fees; that the necessary requisites for such an allowance, as set forth in the note, had been complied with, i.e., the note was collected by an attorney through bankruptcy proceedings; and that the amount of allowance was discretion-

ary and the Referee than entered his allowance in the exercise of his discretion.

It necessarily follows that the opinion of the lower court is incorrect. An inspection of the order appealed from indicates that the court must have felt that a necessary predicate to ordering the Bank to pay over the money was a finding that the Referee's order amounted to a "judgment" on Petitioner's behalf against the Bank, for as pointed out above, the lower court held that the Referee's allowance was in no way **** " a judgment for attorney's fees * * * binding on the Bank ****" for Petitioner's services in the bankruptcy proceedings. It is, of course, not necessary for the Referee's order to be a "judgment," for under the authorities an allowance of attorney's fees is, under Texas law, prima facie evidence to the Court that the creditor and the attorney have agreed that the attorney will be paid at least the amount of attorney's fees claimed, and if the amount asserted is within the amount stipulated in the note, and if the Court finds the same to be reasonable, the Court will then make the allowance. The allowance, not only under the Texas authorities, but under all of the Federal authorities which deal with this matter, is an allowance FOR the attorney. A principle implied in all of these decisions and which is of paramount importance, is the fact that the Referee has complete and sole jurisdiction over the bankrupt's entire estate. Inasmuch as the Referee is administering a fund, he has plenary authority to distribute it. Hence, it is not necessary to hold that the Referee's order amounts to a "judgment" against the Bank to reach the con-

clusion that the order is determinative of the Petitioner's right to participate in the monies paid in satisfaction of the Bank's claim to the extent of the allowance. The enforceability of such a note in bankruptcy proceedings necessarily requires that the Referee see to it that the allowance is paid to the attorney. It is of course upon the implied representation when the claim is filed that the allowance of attorney's fees will be paid to the attorney that the Referee makes the allowance in the first place. It is obvious that no Referee would make an allowance for attorney's fees if at the time the claim is filed the creditor-client states to the Referee that the attorney will not be paid any of the fee. In such a situation no allowance would be made, and a creditor would have to pay his client out of his own pocket. This is another point of importance. The money which the Bank now holds as an attorney's fee never belonged to the Bank. This money belonged to the bankrupt estate, title to which was in the Trustee and the sole authority to distribute which was in the Referee. If the Referee makes an allowance from the bankrupt estate FOR Petitioner, how is it that the Bank can complain when under no theory of law could the Bank ever have any claim to the fund paid?

Another aspect of the order that should be discussed at this point is the portion of the order where the court states that any of the attorney's fees realized by the Bank and not paid to Petitioner "inures" to the benefit of the creditors of the bankrupt. On the surface, this is probably a correct view but it is an over-simplification of this aspect of the matter.

Petitioner would point out in this regard that at all times there has been complete accord between Petitioner and the Bank respecting the agreement for the payment of attorney's fees. The same was true in the proceedings before the Referee as a matter of law, for, when Petitioner and the Bank filed the claim they submitted themselves to the jurisdiction of the Bankruptcy Court for adjustment of rights between them. The filing of the claim was prima facie evidence of an agreement between the parties that such allowance would be paid to Petitioner. In these proceedings the Bank has consistently asserted that it is ready, willing and able to pay a reasonable fee and that it is bound to pay a reasonable fee to Petitioner since in the absence of any firm agreement between the two, the law writes an implied contract to pay a "reasonable fee." Since it has been established that the money which the Bank holds as an attorney's fee belongs to Petitioner and since the amount thereof has been determined by the Referee in the exercise of his discretion to be "reasonable," and since the Bank has at all times said it was ready to pay a reasonable fee to Petitioner, what more needs to be done than for the Bank to pay the money over to Petitioner? In other words, the Referee's allowance of attorney's fees cannot "inure" to the bankrupt's creditors for the very simple reason that all of it belongs to Petitioner.

Both the District and Circuit Courts recognized the sound proposition that the Bank could not "profiteer" at the expense of the attorney and retain to itself monies carved from the bankrupt's assets as an attorney's fee. Paragraph (3) of the District Court's

Judgment, affirmed by the Circuit Court reads:

> (3) Any portion of the attorney's fees allowed by the Referee in No. BK 63-52, and which is realized on a pro rata basis out of money actually collected, or represented by property received by the bank, but not paid to the attorney, inures to the benefit of the creditors entitled thereto, and must be returned by the bank to the bankrupt estate for distribution to them ****"

However the District Court and the Circuit Court are at complete odds in their determination of the number of dollars constituting "attorney's fees allowed by the Referee in No. BK 63-52 * * * realized on a pro rata basis." The District Court was clearly of the opinion that its Paragraph (3), converted into dollars would equal Petitioner's asserted figure of $16,798.38.[12] The Circuit Court after affirming the District Court's order which includes Paragraph (3), purported to "comment" on Paragraph (3) and concluded that only approximately $2,930.00 was the number of dollars of the $240,590.69 recovered by the Bank "by reason of the allowance of attorney's fee(s) as a part of its claim." Using the same formula to-wit, Paragraph (3) of the District Court's Order, the District Court and Circuit Court are $13,868.38 apart. This discrepancy is obviously caused by the Circuit Court's failure to include in its computations

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12 See Second Supplemental Reproduced Record as follows:
Page 4 lines 13-23
Page 9 lines 3 through Page 10, line 2
Page 10 lines 14-19
Page 19 lines 12-18
Page 30 lines 20-24

"any portion of the attorney's fees allowed by the Referee * * * realized on a pro rata basis * * * represented by property received by the Bank ****" as required by Paragraph (3) of the Order affirmed by the Circuit Court. This inherent contradiction in the Circuit Court's opinion is irreconcilable. Petitioner in a lengthly motion for Rehearing mathematically demonstrated this conclusion to no avail.

If it is this difficult for the District and Circuit Courts to agree in this matter the problem will only become compounded if certiorari is denied and the State Court case is then prosecuted to conclusion. This will take a minimum of 18 months after which Petitioner and the Bank must return to the District Court for a determination of how much money, if any ****"realized on a pro rata basis out of money actually collected or represented by property received by the Bank, but not paid to the attorney * * * must be returned by the bank to the bankrupt estate ****" At this juncture the District Court will be faced with the dilemma of choosing between its announced conclusion that $16,798.38 of the $240,490.69 recovered by the bank belongs to the attorney or adopting the Circuit Court's method of ignoring the terms of Paragraph 3 of the Order relating to the $225,000.00 property recovered by the bank and concluding that only $2,930.00 of the $240,590.69 is the sum certain "by reason of the allowance of attorney's fees as part of the bank's claim."

Petitioner most respectfully submits that his argument demonstrates not only the illegality of

permitting a State Court to allow claims in Federal bankruptcy proceedings, but also the practical impossibility of such a procedure. For unless the State Court by the most rarest of coincidences determines that Petitioner is entitled to $25,000.00 for services rendered the Bank in the bankruptcy proceedings, the inevitable and inexorable result will be an unequal distribution of the bankrupt's assets as between the creditors. This result is the specific vice which Congress seeks to avoid through the Bankruptcy Act. enacted pursuant to Art. 1 § 8 of the Constitution. There can be no "uniformity" to such a procedure.

Several questions might legitimately be asked - what if Petitioner's argument is sound, of what importance is it generally? Is it much ado about nothing? Will the rule announced by the Circuit Court apply to other cases?

Petitioner would say that his argument is of great general importance; that it is not much ado about nothing and that the rule announced by the Circuit Court relates TO EACH AND EVERY BANKRUPTCY PROCEEDING IN THE UNITED STATES, for without question in every bankruptcy proceeding claims containing convenants for the payment of attorney's fees are filed and allowed. But what is happening to the attorney's fees allowed on these claims? Are the fees actually going to the attorneys? Is the fee which to its extent depletes the bankrupt's assets actually paid as "attorney's fees" as contemplated by the bankrupt when he executed the note or are creditors "profiteering" and keeping attorney's fees themselves though they be not attorn-

eys and perform no such services? Every bankruptcy proceeding is fraught with claims secured by chattel mortgages, conditional sales contracts, security agreements, deeds of trust, and mortgages of every kind and description, all of which are universally hinged to a written obligation - a promissory note - providing for the payment of attorney's fees in the event of default and collection by judicial proceeding. One can only guess how many millions of dollars each year are paid as attorney's fees by the combined orders of all of the Referees in bankruptcy throughout the country. It is a known fact that a large percentage of creditor claimants falling in this category are banks, savings and loan institutions, finance companies, and other financial institutions which maintain a staff of attorneys as employees or on retainer. Petitioner asserts that substantial amounts of monies are siphoned out of all bankrupt estates under the guise of attorney's fees and that such financial institutions never intend that "their attorney" should receive the amount allowed as attorney's fees.

The record in this case dmonstrates an urgent need for an authoritative decision by this Honorable Court stating that no bankrupt estate may be depleted by the allowance of an attorney's fee unless such fee is allowed by the Referee for actual services rendered by the particular attorney appearing in the bankruptcy proceedings and further requiring that such monies be paid to him.

SUMMARY

The flaw in the decisions of the Courts below

is their failure to recognize not only the exclusive province of the bankruptcy court in allowing or disallowing claims but the specific proposition, as applied to the specific facts of this case, that it is unnecessary to a disposition of this case to determine whether or not the Referee's Order allowing the attorney's fees amounts to a "judgment" on Petitioner's behalf against the bank. This is true because the funds used to pay the attorney come from the bankrupt estate. The funds neither belong to the bank nor can the bank have any lawful claim upon any part thereof. Consequently, though in a true sense the attorney's fees allowance forms a part of the claim "allowed to the bank" the legal effect is to constitute the bank a trustee to the extent of the attorney's fees paid to it for the specific use and benefit of its attorney.This is the rational of the Tenth Circuit's opinion in Webster Drilling Company v. Walker, 286 F. 2 114 which not only concludes that a creditor may not retain an allowance of attorney's fees in Texas, but also holds on authority of this Court's opinions in Brown v. Gerdes, 321 U.S. 178, 64 S. Ct. 487, 88 L ed. 659, and Leiman v. Guttmann, 336 U.S. p. 1, 69 S. Ct. 71 and 93 L ed. 453, that a Referee has wide discretion in allowing attorney's fees and holds further that a Referee's final order allowing or disallowing a claim for attorney's fees based on a note and secured by a deed of trust is res judicata of the amount of the fee.

The opinion of the Court below as respects the issue of res judicata is diametrically contrary to the rule of the Tenth Circuit in Webster, supra.

PRAYER

WHEREFORE PREMISES CONSIDERED, Petitioner prays that because of the stated conflict between the Circuits and because of the important question as to whom, how, when, and under what circumstances and whether by State or Federal Courts attorney's fees may be paid to non-petitioning creditors out of bankrupt estates, Petitioner respectfully urges this Honorable Court to issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review that said Court's final decision in Case Number 24,779 on the docket of said Court, and styled Louis LeLaurin v. Frost National Bank of San Antonio, Texas, as Trustee under the will of Jack Ammann, Deceased, et al; also styled Frost National Bank of San Antonio, Texas, as Trustee under the will of Jack Ammann, Deceased, v. Louis LeLaurin.

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Attorneys for Petitioner
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AFFIDAVIT OF SERVICE

I, Frank Y. Hill, Jr. one of the attorneys for the Petitioner, herein, and not a member of the bar of this Honorable Court, hereby certify that, on the 18th day of September, 1968, I served copies of the foregoing Petition for Writ of Certiorari on Respondents Frost National Bank of San Antonio, Trustee, Dorothy Lee Ammann, David and Mary Jane Ammann, Jack Ammann, Jr., and St. Marys University of San Antonio, Texas, by depositing the same in a United States Post Office with first class Postage Prepaid, addressed to said Respondents Council of Record as follows:

John R. Locke
Attorney for Frost National
Bank, Trustee
Milam Building
San Antonio, Texas

John P. Giles & Joe P. Smyer
Guardians Ad Litem for
David Lee and Mary Jane
Ammann
Milam Building
San Antonio, Texas

John Benbow
Attorney for
St. Marys University
2700 Cincinnati
San Antonio, Texas

Frank J. Greene
Attorney for
Dorothy Lee Ammann
2715 San Pedro
San Antonio, Texas

Jack Ammann, Jr. pro se
603 Mauze
San Antonio, Texas

Frank Y. Hill, Jr.

Before me, the undersigned authority, on this day personally appeared Frank Y. Hill, Jr., known to me to be the person who affixed his name to the above and foregoing instrument and who, after being duly sworn, upon his oath deposed and said that the matters stated therein are true and correct and that he executed the same for the purposes therein stated.

IN EVIDENCE WHEREOF, witness my hand and seal of office this the 18th day of September, 1968.

George R. Adam
Notary Public in and for
Bexar County, Texas

SEAL